



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

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CC:TEGE:EOEG:ET2Boeskin
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Dear Mr. [REDACTED],

Your March 1, 2000, letter to [REDACTED] was forwarded to this office for a response. You asked whether the City of [REDACTED] (City) must pay the Medicare portion of the Federal Insurance Contributions Act (FICA) taxes on certain reemployed police officers. Specifically, you ask whether police officers who retired on a disability pension prior to April 1, 1986, and pursuant to state law, were reinstated to employment in the late 1990s meet the requirements for the continuing employment exception provided by section 3121(u)(2)(C) of the Internal Revenue Code (the Code).

Although we cannot address your specific question, we can provide you with general information about the application of the continuing employment exception. If the City would like to request a private letter ruling, it may do so by following the procedures set forth in the enclosed copy of Revenue Procedure 2000-1, 2000-1 I.R.B. 4.

In general, section 3121(u) of the Code provides that individuals employed by a state or local government employer who begin performing services after March 31, 1986, are subject to the Medicare tax imposed under sections 3101(b) and 3111(b) of the Code. However, section 3121(u)(2)(C) provides a "continuing employment exception." This section, which is entitled "Exception For Current Employment Which Continues," provides that services performed by the employee will not be treated as employment for purposes of the Medicare portion of the FICA taxes if the individual

1. was performing substantial and regular service for remuneration for that employer before April 1, 1986,
2. was a bona fide employee of that employer on March 31, 1986, and

3. did not enter into an employment relationship with that employer for the purpose of avoiding the Medicare tax.

In addition, section 3121(u)(2)(C)(iii) specifies that the worker's employment relationship with the employer must not have terminated after March 31, 1986. Thus, whether a particular officer meets these criteria must be determined on a case by case basis. It may be that some officers are eligible for the exception and others are not. In the case of an officer who retired prior to April 1, 1986, the officer would not have been a bona fide employee on April 1, 1986. Thus, even if later reemployed by the same employer, the officer would not meet the continuing employment exception.

The more frequently asked question about the continuing employment exception concerns workers who were performing substantial and regular services before April 1, 1986, were bona fide employees on April 1, 1986, and later ceased performing services for their employer. When those workers are later reemployed by the same employer, the issue raised is whether their employment relationship terminated. This question might be raised by an officer who retired on a disability after April 1, 1986, and was later reemployed.

Revenue Ruling 86-88, 1986-2 C.B. 172, provides guidance for determining whether an employment relationship terminated. The ruling states that "whether an employment relationship has terminated is a question of fact that must be determined on the basis of all the relevant facts and circumstances." In this regard, "[g]reat weight ... will be given to the personnel rules of the state employer or political subdivision employer to determine if the employment relationship has terminated."

Rev. Rul. 86-88 was supplemented by Revenue Ruling 88-36, 1988-1 C.B. 343, which provides further guidance in question and answer form concerning the application of the Medicare tax. Although none of the questions consider a reemployed retiree, Q&A 7 considers a professor who worked for a state university from September 1985 until June 1986. The professor was granted a leave of absence for the 1986-1987 school year with the right to return to the same position at the end of the leave. In September 1987, the professor returned from leave and resumed the same position with the university. The example concludes that the employment relationship continued because the leave of absence was granted by the university, and the university's personnel policies gave the professor the right to return. The dispositive fact in this example is the treatment of the professor's period of absence under the personnel policies of the university. Thus, to determine whether a reemployed police officer is eligible for the continuing employment exception, requires an analysis of the specific employer's personnel policies.

We hope you find the foregoing information helpful. If you have additional questions, please contact Dan Boeskin (Identification No. 50-16785) of my staff at (202) 622-6040.

Jerry E. Holmes
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Office of Assistant Chief Counsel
(Exempt Organizations/Employment
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CC:
Enclosure